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From: Clark, John F. - WDC [JFCClark@perkinscoie.com]
Sent: Thursday, March 04, 2004 3:23 PM
To: Sheryl Wilkerson; Sam Feder; Jennifer Manner; Paul Margie; Barry Ohlson
Cc: Jeffrey Steinberg; Frank Stilwell; Amos Loveday; Andrea Bruns (E-mail); Andy Lachance (E-mail); Ben G. Almond (E-mail); Connie Durcsak (E-mail); David Jatlow (E-mail); H. Anthony Lehv (E-mail); Harold Salters (E-mail); Jay Keithley (E-mail); Roger Sherman (E-mail); Tony Russo (E-mail)
Subject: Additional Points Regarding the Programmatic Agreement

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Federal Communications Commission
Office of the Secretary

Dear Sheryl, Sam, Jennifer, Paul and Barry,

On behalf of the Wireless Coalition to Reform Section 106, I am attaching a copy of a document that was delivered to the Wireless Bureau today. The document proposes amendments to Sections IV and VI of the Nationwide Programmatic Agreement ("NPA"). These amendments concern issues that have come to light since our Coalition met with each of you (except Barry, who saw the proposed amendments to Section VI, and heard about those to Section IV, this morning).

The amendments to Section IV "Participation of Indian Tribes and Native Hawaiian Organizations" suggest eliminating most of this section from the NPA, allowing tribal consultation to continue for now as provided under current law, and allowing the Commission and the other parties to develop a new set of procedures as soon as possible. This proposal is made because the members of our Coalition believe that the tribal consultation section of the NPA, only recently finalized, may impose unnecessary and substantially increased burdens on both industry and the FCC, and that these burdens may not be sustainable. This section should be further examined and developed allowing for industry input, which so far has been completely lacking since the comments and replies were filed.

The amendments proposed to the Section VI "Identification, Evaluation and Assessment of Effects," propose adding language to sections VI.B.2.a. and VI.E.3. that clarify that visual adverse effects must always first qualify as effects, as that term is already defined in the NPA. Also, we suggest eliminating the four examples of visual adverse effects in section VI.E.3. because three examples don't track current law, were rejected in previous versions of this document, and would be difficult and confusing to implement.

Please feel free to contact me with any questions, as permitted.

Sincerely,

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Please extract the attached file.

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**Proposed Amendments to Sections IV and VI of the
NATIONWIDE PROGRAMMATIC AGREEMENT FOR REVIEW OF
EFFECTS ON HISTORIC PROPERTIES FOR
CERTAIN UNDERTAKINGS APPROVED BY THE FEDERAL
COMMUNICATIONS COMMISSION**

Submitted by the Wireless Coalition to Reform Section 106
Thursday, March 4, 2004

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These amendments are proposed for Sections IV and VI. of the Nationwide Programmatic Agreement. Proposed amendments are shown in blue line, and are suggested and applied to the NPRM version of the NPA

**IV. PARTICIPATION OF INDIAN TRIBES AND NATIVE
HAWAIIAN ORGANIZATIONS IN UNDERTAKINGS OFF TRIBAL LANDS;
TRIBAL CONSULTATION - Alternative A¹**

A. As a part of its responsibilities in connection with Section 106 of the NHPA (16 U.S.C. 470f) and the regulations of the Council (36 C.F.R. Part 800) and pursuant to Section 101(d)(6) of the NHPA (16 U.S.C. § 470(a)(d)(6)), the Commission recognizes its responsibility to consult with any Indian tribe or NHO that attaches religious and cultural significance to a Historic Property if the property may be affected by an Undertaking. Through its rules and the terms of this Agreement, the Commission has authorized Applicants to initiate contacts with Indian tribes and NHOs on its behalf, and to conclude the process of tribal participation consistent with this Agreement where the tribe has not requested government-to-government consultation.

¹ This alternative was discussed in the Telecommunications Working Group and represents the collective effort of Working Group members, including tribal representatives, to address issues raised in the Working Group discussions. The Working Group did not have an opportunity to address the proposal in Alternative B prior to publication for comment.

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B. Consistent with their right to government-to-government consultation, tribal authorities may request Commission consultation on any or all matters at any time, including when an Undertaking proposed off tribal lands may affect Historic Properties that are of religious and cultural significance to that Indian tribe or NHO.

C. Until such time as the signatories hereto develop and approve a full process and set of procedures for the participation of Indian tribes and NHOs in reviews involving undertakings off of tribal lands, the procedures for tribal and NHO participation, and the responsibilities of the Commission and its Applicants, in reviews conducted pursuant to this Agreement will be those procedures set forth in the regulations of the Council (36 C.F.R. Part 800). The signatory parties will endeavor to develop a new set of procedures as soon as reasonably possible, in consultation with Indian tribes and NHOs, and other parties or groups to whom responsibilities under this Agreement are assigned or delegated.

VI. IDENTIFICATION, EVALUATION, AND ASSESSMENT OF EFFECTS

In preparing the Submission Packet for the SHPO/THPO pursuant to Section VII of this Nationwide Agreement and Attachments 3 and 4, the Applicant must: (1) define the area of potential effects (APE); (2) identify Historic Properties within the APE; (3) evaluate the historic significance of identified properties; and (4) assess the effects of the Undertaking on Historic Properties. The standards described below shall be applied by the Applicant in preparing the Submission Packet, by the SHPO/THPO in reviewing the Submission Packet, and where appropriate, by the Commission in making findings.

Identification, evaluation, and assessment are most expeditiously accomplished by individuals with historic preservation and cultural resource management expertise and experience.

Deleted: C. The Commission recognizes that Indian tribes exercise inherent sovereign powers over their members and territory. The Commission also recognizes the unique relationship that the federal government has with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Each Applicant must recognize these facts and conduct all communications with Indian tribes in a sensitive manner, respectful of tribal sovereignty. Contacts shall be directed to the appropriate representative designated or identified by the tribal government or other governing body.¶

D. Applicants should be aware that frequently, Historic Properties of religious and cultural significance to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Accordingly, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking. Such reasonable information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs ("BIA"), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.¶

E. In order to ensure that each identified Indian tribe or NHO has a full opportunity to participate in the Section 106 process and to request government-to-government consultation, the Applicant shall, early in the project planning process, contact in writing any Indian tribe or NHO identified pursuant to

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A. Consideration of Direct Effects and Visual Effects

A SHPO/THPO, consistent with relevant state procedures, may specify geographic areas in which no review for direct effects on archeological resources is required or in which no review, for visual effects is required.

B. Definition of the Area of Potential Effects

1 Direct Effects

The APE for direct effects is limited to the area of potential ground disturbance and the portion of any Historic Property that will be destroyed or physically altered by the Undertaking.

2 Visual Effects

a. Unless otherwise established in consultation with the SHPO/THPO, the presumed APE for visual effects for the construction of new Facilities is the area from which the tower will have an effect as defined herein, and will be visible:

- 1) Within a half mile of the proposed tower, if the proposed tower is 200 feet or less in overall height;
- 2) Within 3/4 mile of the proposed tower, if the proposed tower is more than 200 feet but no more than 400 feet in overall height;
- 3) Within 1 1/2 miles of the proposed tower, if the proposed tower is more than 400 feet in overall height.⁴

b. In the event the Applicant determines, or the SHPO/THPO recommends, that an alternative APE for visual effects is necessary, the Applicant and the SHPO/THPO may mutually agree to an alternative APE.

c. If the parties, after using good faith efforts, cannot reach agreement on the use of an alternative APE, either the Applicant or the SHPO/THPO may submit the issue to the Commission for resolution. The Commission shall make its determination concerning an alternative APE within a reasonable period of time.

⁴ The Conference asks the following be added: "4) For proposed Facilities 1,000 feet or taller, the applicant shall, in consultation with the SHPO, determine the APE for each Facility." *The National Trust concurs with this request.*

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C. Identification of Historic Properties

1. The Applicant, using research techniques and employing methodology generally acceptable to the preservation profession and considering public comments, shall identify Historic Properties in the APE, including Historic Properties to which any Indian tribe or NHO attaches religious or cultural significance.

2. The level of effort and the appropriate nature and extent of identification efforts will vary depending on the location of the project, the likely nature and location of Historic Properties within the APE, and the current nature of and thoroughness of previous research, studies, or Section 106 reviews.

3. No archeological survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites. Disagreements regarding the necessity for an archeological survey may be referred to the Commission for resolution.

4. It may be assumed that no archeological resources exist within the APE where all areas to be excavated related to the proposed Facility will be located on ground that has been previously disturbed to a depth of (1) two feet or (2) six inches deeper than the general depth of the anticipated disturbance (excluding footings and similar limited areas of deep excavation), whichever is greater, and where no archeological resources are recorded in files of the SHPO/THPO or any potentially affected Indian tribe or NHO.

D. Evaluation of Historic Significance

1. The Applicant shall apply the National Register criteria (36 C.F.R. Part 63) to properties identified within the APE and request SHPO/THPO concurrence as part of the review of the Submission Packet.

2. Where there is a disagreement regarding the eligibility of a resource for listing in the National Register and, after attempting in good faith to resolve the issue, the Applicant and the SHPO/THPO continue to disagree regarding eligibility, the Applicant may submit the issue to the Commission. The Commission shall handle such submissions in accordance with 36 C.F.R. § 800.4(c)(2).

E. Evaluation of Effects

1. Applicants shall evaluate effects of the Undertaking on Historic Properties using the Criteria of Adverse Effect (36 C.F.R. § 800.5(a)(1)).

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2. In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties (including locally designated historic districts and traditional cultural properties), and existing land use.

3. An Undertaking will have a visual adverse effect on a Historic Property if the visual effect from the Facility will have an effect on that property and will noticeably diminish the integrity of one or more of the characteristics qualifying the property for inclusion in or eligibility for the National Register. Construction of a Facility will not cause a visual adverse effect except where visual setting or visual elements are character-defining features of eligibility.⁵

4. For collocations not excluded from review by the Collocation Agreement or this Agreement, the assessment of effects will consider only effects from the newly added or modified Facilities and not effects from the existing Tower or Antenna.

Deleted: Examples include (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape

⁵ PCIA suggests the following language: "...Construction of a Facility will not cause a visual adverse effect except where the Facility noticeably diminishes the visual elements of setting, feeling or association within the boundary of a Historic Property, where such elements are important elements of that historic property's eligibility. Examples include Facilities located within the actual, or, for unlisted properties, the most logical or reasonable boundary of (1) a designed landscape which includes scenic vistas, (2) a publicly interpreted Historic Property where the setting or views are part of the interpretation, (3) a traditional cultural property which includes qualifying natural landscape elements, or (4) a rural historic landscape."

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C. The Commission recognizes that Indian tribes exercise inherent sovereign powers over their members and territory. The Commission also recognizes the unique relationship that the federal government has with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Each Applicant must recognize these facts and conduct all communications with Indian tribes in a sensitive manner, respectful of tribal sovereignty. Contacts shall be directed to the appropriate representative designated or identified by the tribal government or other governing body.

D. Applicants should be aware that frequently, Historic Properties of religious and cultural *significance* to Indian tribes and NHOs are located on ancestral, aboriginal, or ceded lands of such tribes and organizations and Applicants should take this into account when complying with their responsibilities. Accordingly, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural *significance* to Historic Properties that may be affected by an Undertaking. Such reasonable information from the relevant SHPO/THPO, Indian tribes, state agencies, the U.S. Bureau of Indian Affairs ("BIA"), or, where applicable, any federal agency with land holdings within the state (e.g., the U.S. Bureau of Land Management). Although these agencies can provide useful information in identifying potentially affected Indian tribes, contacting BIA, the SHPO or other federal and state agencies is not a substitute for seeking information directly from Indian tribes that may attach religious and cultural significance to a potentially affected Historic Property, as described below.

E. In order to ensure that each identified Indian tribe or NHO has a full opportunity to participate in the Section 106 process and to request government-to-government consultation, the Applicant shall, early in the project planning process, contact in writing any Indian tribe or NHO identified pursuant to Section IV.D. above. The communication shall include the elements specified in Section V.C., below, and offer the Indian tribe or NHO an opportunity to provide to the Applicant information about Historic Properties in the APE that should be considered and included in the Submission Packet. The initial communication should explain the Applicant's authority and the tribe's right to request government-to-government consultation as outlined in Section W.A. and B above.

F. The Applicant must ensure that each identified Indian tribe or NHO has a reasonable opportunity to respond to its communication. Ordinarily, 30 days from the time the relevant tribal representative may reasonably be expected to have received an inquiry shall be considered a reasonable time, and in no event shall a reasonable time be less than 30 days unless otherwise agreed by a tribe. Should the tribe request additional time to respond, the Applicant shall afford additional time as reasonable under the circumstances. Notification to the Applicant of the need for additional time should be made, where practical, at least 5 days prior to the close of the initial 30-day period. In general, an Applicant should not assume that failure to respond to a single communication establishes that an Indian tribe or NHO is not interested in participating, but should make reasonable efforts to follow up. Such efforts may include, for example, an additional attempt at written communication, provision of the Submission Packet at

the time it is submitted to the SHPO/THPO, and/or, where practical, contact by telephone.¹

G. regarding Historic Properties, the Applicant shall pursue further discussions with the tribe, unless the tribe requests consultation with the Commission. All requests for government-to-government consultation shall be immediately forwarded to the Commission. If the Applicant receives a comment from an Indian tribe or NHO, it shall invite the commenting tribe or organization to become a consulting party. If the Indian tribe or NHO agrees to become a consulting party, it shall be afforded that status and shall be provided with all of the information, copies of submissions, and other prerogatives of a consulting party as provided for in 36 C.F.R. § 800.2.

H. The Applicant shall submit to each Indian tribe and NHO that it has identified pursuant to Section IV.D., above, or that has informed the SHPO/THPO, the Applicant or the Commission that it attaches religious and cultural significance to a Historic Property within the APE, a Submission Packet as provided in Section VILA. Such submission is not necessary where the Indian tribe or NHO has previously made clear that it does not believe any Historic Property of religious and cultural significance to it may potentially be affected or has failed to respond to repeated attempts at communication.

I. In the event an Applicant and an Indian tribe or NHO are unable to agree regarding a tribe's assertion prior to construction of an adverse effect on a Historic Property of religious and cultural significance to that tribe, the Applicant shall not commence construction without authorization from the Commission. The Commission, in consultation with the tribe, shall carefully consider all positions and rule on all such disagreements with reasonable promptness.

J. Information regarding Historic Properties to which Indian tribes attach religious and cultural significance may be highly confidential, private, and sensitive. If a tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request confidential treatment of such materials or information in accordance with Section 304 of the NHPA (16 U.S.C. § 470w-3(a)) in the event they are submitted to the Commission. The Commission shall provide such confidential treatment consistent with applicable federal laws.²

¹ PCIA has expressed concern that this paragraph is difficult to apply and understand because its timing is indefinite. The Conference believes the Programmatic Agreement should not add deadlines to those already in 36 C.F.R. Part 800.

² The Conference notes that "The confidentiality provision in the National Historic Preservation Act is equally applicable to all historic properties not just traditional cultural properties. The reasons for withholding information are significant invasion of privacy, risk of harm to the resource and impeding the use of a traditional cultural property." The Council proposes that this provision be revised to read as follows: "If a Tribe or Native Hawaiian Organization requests confidentiality from the Applicant, the Applicant shall notify the Commission. The Commission shall honor this request and shall, in turn, request confidential treatment of such materials or information consistent with applicable Federal laws." USET states that confidentiality is of central importance to tribes and that confidentiality restrictions should be in place on Applicants whether or not a tribe or NHO has requested confidentiality.

K. Nothing in this Section shall be construed to prohibit or limit Applicants and Indian tribes from entering into or continuing pre-existing arrangements or agreements governing their contacts, provided such arrangements or agreements are otherwise consistent with federal law.